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Supreme Court, U.S.
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No. 88-1364

In The

Supreme Court of the United States

October Term, 1988

PIERRE A. AVERETTE and
SHIRLEY A. AVERETTE,

Petitioners,

v.

TRIPLE CREEK CORPORATION,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Georgia

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Does a state court's enforcement of private restrictive covenants governing the types of signs which may be erected on private property within a subdivision constitute impermissible state action in violation of the First Amendment?

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STATEMENT OF THE CASE

Respondent[1] accepts Petitioners' statement of the case as essentially correct. This case concerns a trial court's enforcement by interlocutory injunction of private restrictive covenants which, among other things, govern

[1] Respondent Triple Creek Corporation has no parent company. Nor does it have any subsidiaries (other than wholly owned subsidiaries) or affiliates. This statement is given in compliance with Rule 28.1 of the Supreme Court Rules.

the type of signs which may be erected on private property within a subdivision. APP. 2. The Supreme Court of Georgia, all justices concurring, affirmed the trial court without opinion. APP. 1.

REASONS FOR DENYING THE WRIT

1. The decision below does not conflict with any decision of this Court.

Petitioners have not cited any decision in which this Court has ever held that a state court's enforcement of a private agreement restricting freedom of speech constitutes impermissible state action in violation of the First Amendment. Nor is counsel for Respondent aware of any such decision.

It is well settled that a state court may not constitutionally enforce a private restrictive covenant which discriminates against black people on account of race. *See Shelley v. Kraemer*, 334 U.S. 1 (1948). The Court has not, however, extended the rationale of *Shelley* to prohibit private limitations on the exercise of free speech. *See PruneYard Shopping Center v. Robins*, 447 U.S. 74 (1980); *Hudgens v. NLRB*, 424 U.S. 507 (1976); *Lloyd Corp. v. Tanner*, 407 U.S. 551 (1972).

In the *PruneYard*, *Hudgens*, and *Lloyd* cases the Court made clear that the First Amendment does not impair the right of a private property owner to restrict the speech permitted on his property. While these cases did not arise from the judicial enforcement of the property owners' rights, the Court's recognition of their rights would be meaningless if judicial enforcement were proscribed.

Therefore, it necessarily follows that a private property owner may resort to state courts for protection of his right to limit the exercise of free speech on his property without transgressing the First Amendment.

In this case private property owners within a subdivision agreed at the outset to restrictive covenants limiting the posting of signs within their subdivision. They also agreed to a means of amending those covenants[2] and later amended them.[3] While the Petitioners focus on the further limitations set forth in the amendment to the covenants, the amendment also expanded the types of permissible signs.[4]

Under this Court's rulings in the *PruneYard*, *Hudgens*, and *Lloyd* cases a single private property owner clearly may limit the posting of signs on his property as the covenants have done in this case. There is no reason that private property owners within a subdivision may not do the same by agreeing to restrictive covenants. Nor is there any reason to distinguish their situation from that of a single property owner's in determining whether judicial enforcement of the restrictions to which they have agreed constitutes state action for purposes of the First Amendment.

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[2] APP. 16.

[3] APP. 6-7.

[4] *Compare* APP. 12 *with* APP. 13-15.

2. The decision below is not a final judgment.

The Court lacks jurisdiction to grant the Petition for a Writ of Certiorari because it does not present a "Final [judgment or decree]." 28 U.S.C. § 1257. In this case the Supreme Court of Georgia merely affirmed the trial court's interlocutory injunction. Such injunctions are not final. 16 C. Wright, A. Miller, E. Cooper, & E. Gressman, *Federal Practice and Procedure* § 4009 at p. 575 (1977).

Indeed, this case presently is on a two-week trial calendar beginning March 27, 1989, and almost certainly will be tried prior to the conclusion of that calendar on April 7, 1989. In addition, the issue of permanent injunctive relief is currently the subject of a Respondent's motion for summary judgment, which may or may not be ruled on in view of the upcoming trial. In any event, the matter has not yet been finally determined even in the trial court.

Given the procedural posture of this case, review by this Court would be premature, and the Petitioners have stated no reason for review based on any of the Court's expanded finality rulings.

CONCLUSION

The Court should deny the Petition for a Writ of Certiorari to the Supreme Court of Georgia because the decision below does not conflict with any of the Court's

decisions and because it is not a final judgment or decree within the purview of 28 U.S.C. § 1257.

Respectfully submitted,

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